Supreme Court, U.S.
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No. 06-1206

IN THE

Supreme Court of the United States

J.H. FLETCHER & CO.,

Petitioner,

v.

JERRILL DAVIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the West Virginia Supreme Court's interlocutory decision below under 28 U.S.C. § 1257, under which this Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had[.]"

2. If the Court determines that it has jurisdiction, then the question on the merits is whether this Court should review the unanimous decision of the West Virginia Supreme Court, holding that the federal Mine Safety and Health Act does not preempt Respondents' state common-law claims arising from injuries caused by the operation of machinery manufactured by Petitioner, where (a) no appellate court has ever adopted a contrary view; and (b) the Act's "savings clause," 30 U.S.C. § 955(a) and (b), expressly authorizes the enforcement of any State law or regulation that is more stringent than federal standards.

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STATEMENT OF THE CASE

Respondents suffer from the incurable lung disease silicosis as a result of their work as underground miners in West Virginia coal mines. These coal miners performed different tasks, including operating roof bolting machines manufactured by Petitioner J.H. Fletcher & Co. These machines drill into rock laden with quartz and generate significant levels of silica dust that miners breathe into their lungs. Tragically, excess exposures to silica dust in these coal mines continue to be routine, and several respondents have advanced forms of silicosis, including one former roof bolter who recently underwent a double lung transplant. Respondents brought these civil actions alleging negligence, product design and failure to warn claims against Fletcher because it either installed no dust collection or suppression systems on its roof bolting machines, or installed systems that were defective and failed to adequately limit exposures to silica dust.

After these lawsuits were filed in Mingo County, West Virginia, Fletcher moved to dismiss in each of the pending cases based, among other things, on federal preemption. The court found that federal law impliedly preempts the claims in these cases, but certified the issues to the West Virginia Supreme Court of Appeals and stayed the cases.

The West Virginia Supreme Court of Appeals reversed unanimously, holding that the federal Mine Safety and Health Act ("MSHA") does not preempt the common law personal injury claims alleged in these cases, and specifically rejected each of Fletcher's preemption arguments. First, the court found that 30 U.S.C. § 955(b), which provides that "State law or regulation[s]" more stringent than the MSHA shall

not be deemed in conflict with the MSHA, signaled Congress's intent to allow for these state common law claims. Second, the court found that although there are detailed federal regulations applicable to roof bolting machinery, the § 955(b)'s clear text, along with the absence of preemptive language in the remainder of the statute or regulations, indicated that Congress did not intend to preempt state common law personal injury claims. Moreover, the court found that the MSHA provides unambiguously that the savings clause in § 955(b) applies to coal mine operators *and* equipment manufacturers, such as Petitioner Fletcher. Third, the court found that conflict preemption does not exist because compliance with more stringent state health and safety standards is not impossible. Fourth, the court held that the MSHA's plain language reveals that Congress anticipated non-uniform results by including the savings clause in § 955, which specifically authorizes more stringent state health and safety standards, and by the inclusion of other language in §§801 and 953, which encourages states to develop and enforce more stringent laws and regulations that will further protect the health and safety of coal miners. Finally, the court held that state law claims will serve the important purpose of encouraging roof bolting machine manufacturers to strive to make their products safer. Indeed, the court noted that the federal regulations recognized that dust collection systems may be manufactured in ways that exceed federal regulations.

REASONS FOR DENYING THE PETITION

I. THIS COURT DOES NOT HAVE JURISDICTION.

This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the West Virginia Supreme Court of Appeals reformulated and answered two certified questions, which effectively reversed the trial court's proposed dismissal of the case and remanded the case for further proceedings. Thus, the decision below is not a "final judgment" within the meaning of section 1257.

This Court has identified four exceptions to section 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 522 U.S. 75, 82 (1997). As to these three categories, the judgment involved here does not even arguably apply. If Fletcher prevails on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Id.* at 78. On the other hand, if Fletcher does not prevail on remand, it "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.* at 82-83.

The fourth *Cox Broadcasting* exception applies only when two requirements are met. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

This category is also inapplicable because "refusal immediately to review the state-court decision" presents no risk of "seriously erod[ing] federal policy." As we explain further below, the decision of the West Virginia Supreme Court of Appeals was correct. But even if were not, a trial on the merits of Respondents' claims, with a right of review in this Court if Respondents were to prevail, would not run contrary to, let alone "seriously erode," federal policy. After all, the MSHA specifically permits enforcement of state laws and regulations that are more stringent than comparable federal laws and regulations; thus, even assuming that a small category of state tort claims are preempted by the MSHA, the Act, in general, sees federal law as a floor, not a ceiling, vis-a-vis state law. *See Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 870 (2000) ("And it [National Traffic and Motor Vehicle Safety Act] thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor").

Thus, it is difficult to see how any one pending personal-injury case involving injuries arising from underground coal mining could present the type of "serious erosion" contemplated by this Court in *Cox*. *See Florida v. Thomas*, 532 U.S. 774, 780 (2001) (rejecting notion that alleged misinterpretation of Fourth Amendment should be reviewed because "the State can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials."). Moreover, no one here claims that the ordinary defense of preemption is an immunity, where the very right not to stand trial is at stake. *Compare Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (to allow litigation to go forward where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *with Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (holding that to allow case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts).

In sum, because this case does not fit any exception to § 1257's final judgment requirement, this Court lacks jurisdiction to review the decision below.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEAL OR STATE COURTS OF LAST RESORT.

Fletcher does not contend, nor could it, that the West Virginia Supreme Court of Appeals' decision conflicts with a decision of another state court of last resort or a decision of any federal court of appeals. Indeed, *no* appellate court has *ever* adopted the position advanced by Fletcher. For that reason alone, this Court should deny review.

Therefore, Petitioner has failed to provide compelling reasons for this Court to grant certiorari in this matter. In the final analysis, there is no compelling reason to grant this Petition because the West Virginia Supreme Court's decision left scant room for doubt that it was correctly decided.

III. THE WEST VIRGINIA SUPREME COURT OF APPEALS CORRECTLY INTERPRETED THE FEDERAL MINE SAFETY AND HEALTH ACT AND FOUND THAT FIELD PREEMPTION DOES NOT BAR RESPONDENTS' STATE COMMON LAW CLAIMS.

A. The Federal Regulations Relating to Dust Collectors on Roof Bolting Machines Do Not Create Field Preemption.

Petitioner Fletcher argues that although the MSHA contains an explicit savings provision in § 955 which provides that any state laws that are more stringent will not be in conflict with the MSHA, the detailed federal regulations found in 30 C.F.R. Part 33 (2006) nonetheless mean that Congress did not intend to have any state involvement on issues relating to roof bolting machines. The West Virginia Supreme Court rightfully disposed of this argument by first pointing to the best evidence of Congress's intent, which is found in § 955 of the Act:

> (a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter

> or with any order issued or any mandatory health or safety standard.
>
> (b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter. The provisions of any State law or regulation in effect December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard, shall not be held in conflict with this chapter.

Pet. App. at 15a-16a.

Most notably, Petitioner Fletcher asserts without any supporting authority or statutory language that Congress only intended for the above language to apply to certain areas of state supplementation of coal mine health and safety, but not to the manufacturers of roof bolting machines. More specifically, Petitioner asserts that because there are detailed federal regulations relating to roof bolting machines and dust collection systems contained in 30 C.F.R. Part 33, field preemption exists. Since "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue," the

West Virginia Supreme Court began its analysis by going directly to the MSHA. *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993). After reviewing the language set forth in the MSHA, the West Virginia Supreme Court explained that "because Congress has clearly expressed its intent not to preempt all state law or to occupy the entire field, we conclude that field preemption does not exist in this case." Pet App. at 16a.

In addition, the court below rejected Fletcher's contention that Congress did not intend for § 955 to apply to roof bolting machine manufacturers, but instead intended to occupy the entire filed based on the regulations found in 30 C.F.R. Part 33. The court pointed to 30 U.S.C. § 802(h)(1), which explicitly provides that "coal or other mine" means, among other things, "equipment" and "machines" "used in, or to be used in . . . the work of extracting . . . minerals." Pet. App. at 17a-18a. The court found no ground, especially in the absence of express language to the contrary, to exclude roof bolters from application of the § 955 savings clause. Pet. App. at 18a.

The West Virginia Supreme Court's analysis is in harmony with this Court's jurisprudence, which holds that "[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Bates, et al. v. Dow AgroSciences*, LLC, 125 S.Ct. 1788, 1801 (2005). Further, as set forth in *Medtronic v. Lohr*, "[i]t is, to say the least, difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.*, 518 U.S. 470, 487 (1996) (citing *Silkwood v. Kerr-McGee Corporation, et al.*, 464 U.S. 238 (1984)).

In the present case, Congress expressed unequivocally that it does not intend to preempt more stringent state laws and regulations relating to mine safety and health issues. Moreover, the MSHA makes it clear that that the language applies equally to equipment and machinery manufacturers. The mere fact that certification regulations exist in 30 C.F.R. Part 33 does not provide this Court with evidence that despite the clear and unambiguous statement in § 955, Congress nonetheless meant to preempt state common law claims. Indeed, "[i]f Congress intended such a result, its failure even to hint at it is spectacularly odd . . ." *Medtronic*, 518 U.S. at 491.

B. The West Virginia Supreme Court of Appeals Correctly Held that Conflict Preemption Does Not Exist Simply Because a Jury May Find That Fletcher's Roof Bolting Machines are Defective.

Fletcher also contends that allowing a judge or jury to find liability would conflict with federal law because its roof bolting machines must comply with certain federal regulations. In finding that these arguments do not provide a basis for implied preemption, the West Virginia Supreme Court followed this Court's direction on preemption principles.

First, the court emphasized that Fletcher failed to demonstrate that it is impossible to comply with a jury verdict that may create or enforce more stringent standards than federal law. Indeed, the court noted that Petitioner's compliance with more stringent state standards, as permitted under § 955, would necessarily and logically mean that it is possible to comply with the less stringent federal standards. Pet. App. at 20a.

Second, the court found that the MSHA's overriding purpose is to protect the health and safety of coal miners. Significantly, a jury verdict based on a more stringent standard than that set forth in the federal regulations would not frustrate the stated purpose of the Mine Safety and Health Act, which provides in § 801(a) that "Congress declares that – (a) the first priority and concern of all in the coal mine or other mining industry must be the health and safety of its most precious resource – the miner." Moreover, the MSHA is filled with other similar examples of Congress's paramount concern with protecting the health and safety of coal miners. For example, Congress emphasized that states should be assisted in the development and enforcement of effective state coal or other mine health and safety programs; that the federal government should promote, assist, and encourage the development of more stringent state laws relating to occupational disease and mine health and safety; and that in cooperation with states, research and development and training programs aimed at preventing occupationally caused diseases in the industry should be developed. Pet. App. at 20a-21a; 30 U.S.C. §§ 801, 953.

Thus, much like *Medtronic,* where this Court pointed out that the "the primary issue motivating the MDA's enactment [was] the safety of those who use medical devices," *Medtronic*, 518 U.S. at 490-91, the court below was persuaded by the wealth of language in the MSHA which evidences a primary objective of protecting the health and safety of coal miners. *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (". . . [T]he concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more predominant objective, emphasized by its title, of promoting boating safety"). Thus,

the goals and objectives of the statute would be enhanced, not frustrated, by state common law supplementation.

Additionally, Fletcher argues that allowing juries to consider whether Fletcher's roof bolting machines are defective or fail to adequately warn would create uncertainty and non-uniformity across the country. Pet. at 11-12. Petitioner cites *Geier* in support of its policy goal of uniformity, but fails to point out that this Court explained that "the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce safety standards, while simultaneously providing necessary compensation for victims." *Geier,* 529 U.S. at 1920. This Court has followed the same course in *Bates, Medtronic* and a host of other cases in holding that it is entirely appropriate to allow a jury to decide whether a manufacturer subject to extensive federal regulation has designed a reasonably safe product. *See, e.g., Bates,* 125 S.Ct. at 1799; *Medtronic,* 518 U.S. at 487; *Sprietsma,* 537 U.S. at 70. Indeed, this Court pointed out that "there is no reason to think such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that everyday bear the risk of conflicting jury verdicts." *Bates,* 125 S.Ct. at 1803.

Fletcher also contends that the phrase "any State law or regulation" should be interpreted to mean only legislation or agency regulation, not common law. Pet. at 13. Petitioner made the exact *opposite* argument in the court below, where it asserted in furtherance of its confused express preemption argument to the West Virginia Supreme Court that "State law" includes common law. *See* July 3, 2006 Reply Brief of Appellant/Defendant-Below, J.H. Fletcher & Co. to

Appellees' Response at p. 35 ("The FMSHA preemption provision is not ambiguous. It defines preemption in express conflict terms, specifically defined as '[a]ny State law' . . . . 'State law' includes common law."). Now, Fletcher has completely reversed course and seeks to distort this Court's opinion in *Sprietsma,* 537 U.S. at 63, which found that the phrase "a law or regulation" does not encompass common law claims. There, the Court emphasized that the letter "a" implies a discreteness which is embodied in statutes. *Sprietsma*, 537 U.S. at 63. In the present case, as Petitioner rightfully conceded in the court below, the phrase found in the MSHA is far more expansive than "a law or regulation." Indeed, the MSHA broadly authorizes "any State law" that is more stringent than that provided for by MSHA or the federal regulation. As this Court explained in *Cipollone v. Liggett Group, Inc., et al.,* "[a]t least since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we have recognized the phrase 'state law' to include common law . . ." *Id.*, 505 U.S. 504, 522 (1992).

Finally, the court below emphasized that faithful compliance with regulatory standards does not mean that Congress intended to shield Petitioner from claims that its dust collectors are defective. This Court has repeatedly preserved common law claims despite the presence of comprehensive and detailed federal regulatory schemes. The court below pointed to the language in § 955, which explicitly authorizes more stringent health and safety standards applicable to coal mines and equipment and machinery. Pet App. at 24a. The court also pointed to the strong public policy reasons which oppose finding preemption in this case. Allowing juries to create and enforce safety standards will ensure that product manufacturers, including Petitioner, will continually strive to make those products safer than the

minimum standards required by federal Act. Pet. App. at 24a. Further, the court explained that 30 C.F.R. § 33.20 recognizes that "all possible designs, arrangements, or combinations of components and materials [of dust collectors] cannot be foreseen." Pet. App. at 24a. Thus, Congress wisely understood that safer designs may be produced years after adoption of the federal regulations. Those safer designs would be frozen out of the market place by substituting an outdated regulatory standard for the benefits of safer technology. Allowing juries to create and enforce more stringent standards would have the effect of producing safer roof bolters, and is entirely consistent with the many decisions of this Court.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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